

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10, SUBREGION 11**

**DUKE ENERGY CAROLINAS, LLC**  
**Employer<sup>1</sup>**

**and**

**Case 10–RC–230018**

**INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 962, AFL-CIO**  
**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

The Employer, Duke Energy Carolinas, LLC, engages in generating, transmitting, distributing, and selling electrical power to customers in the North Carolina and South Carolina. The Petitioner, International Brotherhood of Electrical Workers, Local 962, AFL-CIO, filed this petition under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of all full-time Associate System Operators, System Operators I, System Operators II, Senior System Operators, and Lead System Operators in the Energy Control Center at the 9550 Research Drive facility in Charlotte, North Carolina, excluding all guards and supervisory personnel as defined in the National Labor Relations Act.<sup>2</sup>

The Employer contends that the petition should be dismissed because the unit Petitioner seeks to represent is comprised entirely of individuals exempt from representation under the Act.

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<sup>1</sup> The name of the Employer appears as amended at the hearing.

<sup>2</sup> The parties stipulated that there is no contract bar. Board Exhibit 2 sets forth all stipulations of the parties.

The unit description appears as amended at the hearing by the parties' stipulation. While the petition refers to the same five job titles within the System Operator classification, it specifically limits inclusion to individuals in those titles reporting to two named managers, Daniel Stephens and John Lyerly. The record reveals an additional manager, Edward McMillen, to whom the System Operators also report. The amended petition includes classifications reporting to all three managers.

The Employer makes two primary arguments: (1) its System Operators are supervisors within the meaning of Section 2(11) of the National Labor Relations Act because they have the supervisory authority to assign and responsibly direct other employees using independent judgment; and (2) its System Operators are managerial employees and therefore not employees within the meaning of Section 2(3) of the Act.

A hearing officer for the National Labor Relations Board conducted a hearing on the two issues raised by the petition. During the hearing, all parties were given an opportunity to present evidence. Both parties filed post-hearing briefs, which I have duly considered. Based on the record evidence and relevant Board law, the Employer has not satisfied its burden to show that the petitioned-for System Operators are either statutory supervisors or managerial employees. At the hearing, the parties agreed that an appropriate unit would include the disputed employees if they were not supervisory or managerial. There are approximately 53 employees in the unit. Accordingly, I am directing an election in the petitioned-for unit.

To provide a context for my discussion of the issues in this decision, I will first provide an overview of the lack of bargaining history for this group of employees, the Employer's operations, and the general duties of System Operators. As to each of the two issues raised by the petition, I will first discuss the applicable legal principles. I will then set forth the facts and reasoning in connection with my conclusions that the Employer has not carried its burden to establish that the petitioned-for System Operators are either statutory supervisors or managerial employees under the Act.

## **I. OVERVIEW**

### **A. LACK OF BARGAINING HISTORY**

At hearing the parties stipulated that there are no known previous attempts to organize the individuals employed in the petitioned-for unit and there are no other represented units at the Employer's facility.

### **B. EMPLOYER'S OPERATIONS**

The Employer is a regulated public utility that generates, transmits, distributes, and sells electricity to approximately 2.7 million customers located within its service territory in North Carolina and South Carolina.<sup>3</sup> The Employer is part of a network of public utilities collectively responsible for ensuring the security and reliability of the North American Bulk Electric System. The Bulk Electric System is a highly-complex, interconnected network of electrical components, including every power generator and transmission device connected to the North American grid at 100 kilovolts and above.<sup>4</sup> As a registered public utility connected to the Bulk Electric System, the Employer is subject to various regulatory authorities, including the Federal Regulatory Energy Commission, North American Electric Reliability Corporation (NERC),<sup>5</sup> SERC Reliability Corporation and its subsidiary known as VACAR (for Virginia-Carolinas) South.

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<sup>3</sup> Duke Energy Carolinas is one of several companies within Duke Energy. Duke Energy companies collectively serve customers located in North Carolina, South Carolina, Kentucky, Ohio, Indiana and Florida.

<sup>4</sup> The federal government, through various regulatory authorities, has qualified the Bulk Electric System as infrastructure critical to the national security of the United States and, to that end, established Critical Infrastructure Protection (CIP) standards to guide and direct the protection of the Bulk Electric System from both cyber and physical threats.

<sup>5</sup> Since approximately 2007, NERC has administered and enforced mandatory Reliability Standards, which regulate utilities in the area of system operations, among others.

All of the petitioned-for System Operators work in the Energy Control Center at the 9550 Research Drive facility in Charlotte, North Carolina.<sup>6</sup> The Charlotte Energy Control Center is the command control center for the Employer’s power-generating resources<sup>7</sup> and transmission equipment connected to the Bulk Electric System. The Charlotte Energy Control Center is part of the Transmission System Planning and Operations division. Nelson Peeler is Senior Vice President and Chief Transmission Officer. His role covers the full scope of the transmission business of Duke Energy, including planning, design, construction, maintenance, and operations. Reporting to Peeler is Vice-President of Transmission System Planning and Operations John “Sam” Holeman who is responsible for all five of Duke Energy’s Energy Control Centers, including the Charlotte Energy Control Center.<sup>8</sup> Director of System Operations Minh Calloway manages the Charlotte Energy Control Center and reports directly to Holeman. Reporting directly to Callaway are: 1) Control Area System Operations Manager Daniel Stephens, who manages approximately 19 System Operators<sup>9</sup> performing Balancing Authority functions and Reliability Coordinator functions; 2) Transmission Operations Manager John Lyerly, who manages approximately 25 System Operators performing Transmission Operator, or “TOP”

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<sup>6</sup> There are other business units and control centers located within the Research Drive facility, including the Distribution Control Center. The parties stipulate that there are no System Operators in the Distribution Control Center at the Research Drive facility.

<sup>7</sup> Those generation resources include nuclear, hydro, solar, natural gas and coal generator plants.

<sup>8</sup> Those Energy Control Centers are located in Raleigh, North Carolina; St. Petersburg, Florida; Cincinnati, Ohio; and Plainfield, Indiana.

<sup>9</sup> The total number of System Operators reporting to each manager reflects the number shown on the Duke Energy organization chart. See Employer Exhibit 2 (E-2), pp 23-24; 26. Director Callaway’s testimony indicated recent changes to these numbers in discussing the number of three-person crew teams for the Balancing Authority and Reliability Coordinator group reporting to Stephens and the TOP group reporting to Lyerly.

functions; and 3) Outage and SCADA<sup>10</sup> Coordination Manager Edward McMillen, who manages approximately nine System Operators (Outage Coordinators) and eight Engineers.

With the exception of the nine Outage Coordinators who report to McMillen,<sup>11</sup> all of the petitioned-for System Operators work on the control room floor of the Charlotte Energy Control Center.<sup>12</sup> The control room is about the size of a basketball court and operates 24 hours a day, 365 days a year. The control room is divided into two sides: the Balancing Authority Side and the TOP Side. Located within the Balancing Authority Side are three different functional consoles or desks:<sup>13</sup> the balancing desk (also referred to as the generation desk); the interchange desk; and the reliability desk. On the TOP Side, there are six different transmission operator consoles. In one corner of the Balancing Authority Side, there is an office where Stephens works and on the TOP Side, Lyerly also has a similar office. Both offices have glass windows allowing the managers to oversee the activities of the System Operators on the work room floor. Lyerly and Stephens do not work shift hours and are the only managers who work in the control room of the Charlotte Energy Control Center.<sup>14</sup>

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<sup>10</sup> SCADA is an acronym for Supervisory Control and Data Acquisition System.

<sup>11</sup> The Outage Coordinators work in a room immediately adjacent to the control room. The record is silent on the shift hours of those individuals and how many Outage Coordinators are scheduled to work each shift. Record testimony described Outage Coordinators as the “planning arm” of the TOP organization.

<sup>12</sup> There is one Associate System Operator who reports to Lyerly. The record does not establish the primary work location of that individual or what amount of time, if any, this individual spends in the control room as part of on-the-job training.

<sup>13</sup> The terms “console” and “desk” are used interchangeably. All Balancing Authority Side desks and TOP Side desks are one-person workstations arranged in the shape of a horseshoe.

<sup>14</sup> Lyerly testified that while he is NERC-certified, he is not job-task verified by the Employer. As explained below, this means that Lyerly could not independently operate any of the consoles in the Charlotte Energy Control Center control room.

One System Operator works at each of the control room consoles on rotating 12-hour shifts. The day shift on the Balancing Authority Side begins at 5:00 a.m. and the night shift begins at 4:00 p.m. On the TOP Side, the day shift runs from 5:30 a.m. to 5:30 p.m.<sup>15</sup> System Operators on both sides of the control room typically work in three-person crew teams. There are six three-member crews on the Balancing Authority Side. Each shift on the Balancing Authority Side is staffed with one crew. The Employer staffs the TOP side more heavily during day shift – when ongoing project work such as preventive maintenance is occurring – than at night. Thus, of the eight three-person TOP side crews with two crews at a time will be assigned to work on the day shift and one crew on night shift.<sup>16</sup> Record evidence indicated that System Operators typically work either the day shift or night shift for three straight days and then have up to the next five days off. During “relief weeks” the Employer schedules System Operators outside their usual schedule to fill in for absences.

### **C. OVERVIEW OF THE PETITIONED-FOR SYSTEM OPERATORS**

There are six levels in the set, hierarchal path of progression for the System Operator classification at the Charlotte Energy Control Center (from low to high): Associate System Operators, System Operators I, System Operators II, Senior System Operators, Lead System Operators; and Principal System Operator. The highest level, Principal System Operator, is currently unfilled at the Charlotte Energy Control Center and is not specifically included in the petitioned-for unit.

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<sup>15</sup> The record does not clearly establish the hours of the night shift; presumably, the night shift is from 5:30 p.m. to 5:30 a.m., as the control room operates 24 hours per day.

<sup>16</sup> At the time of the hearing, there was one two-member crew on the TOP Side and the other crews all had three members.

NERC requires System Operators to be both NERC-certified and functional job-task verified<sup>17</sup> in order to independently operate on the Bulk Electric System in real time.<sup>18</sup> The Employer further requires its System Operators to be NERC-certified at the highest level of Reliability Coordinator. The training department at the Charlotte Energy Control Center is responsible for creating and administering the Employer's training program to become functional job-task verified, but the training is NERC-driven. System Operators at any progression level can be job-task verified on the NERC-defined operational functions, including Balancing Authority; Reliability Coordinator, and Transmission Operator.

An individual hired at the entry-level Associate System Operator position is in training and under the direction of the training program. The first part of Associate System Operator training is becoming NERC-certified, after which, the individual will continue training to become job-task certified. This includes in-class training, simulator training and on-the-job (OTJ) training.<sup>19</sup> While it is possible for an entry-level Associate System Operator to be NERC-certified at time of hire, the Employer ensures familiarity on each job-task specifically before conferring job-task verification; therefore, it typically takes an Associate System Operator anywhere from six months to two years to move to the next progression of System Operator I.

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<sup>17</sup> Job-task verification is specific to the Employer and is not transferrable to the Energy Control Centers of other Duke Energy companies.

<sup>18</sup> This NERC requirement is Operating Personnel Credentials Standard PER-003-1, reflected in Employer Exhibit 3 (ER-3).

<sup>19</sup> During on-the-job training in the control room, Associate System Operators are usually paired with experienced Senior System Operators and Lead System Operators, who are responsible for observing the Associate System Operators in their performance of each reliability-related task associated with the operational function to which they are assigned. Once the higher level System Operator has observed the Associate perform any of the tasks on the competency checklist, he will sign off on the checklist for that task.

Per NERC standards, Associate System Operators “performing any reliability-related task of a real-time operating position must be under the direct supervision of a NERC Certified System Operator stationed at that operating position” and further mandates that the higher-level System Operator “has ultimate responsibility for the performance of the reliability-related tasks” completed by the Associate System Operator in the control room.

With the exception of the Associate System Operator position, all of the job descriptions for the petitioned-for job titles of the System Operator classification contain the following general description of System Operator duties:

The System Operator position has the responsibility and clear independent decision making authority to alleviate operating emergencies or direct timely and appropriate real-time actions to ensure stable and reliable operations on a 24 by 7 basis during both normal and emergency conditions. This responsibility and independent decision making authority includes actions up to and including firm load shedding to prevent or alleviate System Operating Limit or Interconnection Reliability Operating Limit violations. This authority does not require the approval, involvement, or presence of higher level management personnel to execute.

The System Operator monitors bulk electric system parameters such as system load, frequency, voltage, line flows, transformer flows, voltages, etcetera via the Energy Management System and other systems and has the responsibility and accountability to ensure the electric system meets demand while being operated within defined parameters. The System Operator shall act to return the system to these prescribed parameters when excursions occur. The System Operator shall be familiar and comply with reliability standards applicable to real time operations and will operate the system in accordance with these standards. Where a power system provides off-site power to Nuclear Power Plants, the System Operator shall operate the power system such that reliable off-site power is provided to the Nuclear Power Plants in such a manner as to mitigate risk to the public’s health and safety.<sup>20</sup>

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<sup>20</sup> See Employer Exhibit E-3.

The System Operator job titles are not specific to any one function or console within the control room. The job titles of System Operator I and above can independently work on any of the consoles in the Charlotte Energy Control Center control room, so long as the individual is job-task verified by the Employer to perform the operational function of the console. The petitioned-for System Operators perform job duties that are generally very similar to each other, but differ primarily with respect to the operational differences between the functions that are carried out at the assigned console. The System Operators use and rely on many of the same system operation tools in the course of performing their duties and are all required to comply with NERC regulations and reliability standards, as well as Employer-established policies and procedures.

The three informal groups of System Operators and the associated NERC-defined functions they carry out are discussed below:

### **1. Balancing Authority**

Generation/Balancing Desk: Per NERC reliability standards, the Employer is required to maintain a continuous balance between its generating resource outputs and system load requirements in order to ensure the security and reliability of the Bulk Electric System.<sup>21</sup> Balancing Authority is a NERC-defined function of System Operators and involves what is commonly referred to as “generation dispatch.” Both Balancing Authority and Reliability Coordinator System Operators reporting to Stephens on the Balancing Authority Side of the control room are responsible for constantly maintaining this balance between generation and load

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<sup>21</sup> “Load” refers to the aggregate amount of electrical energy that the Employer’s customers are consuming at any given time. In simple terms, load is the demand of energy on the system and generation is the supply of energy.

and in doing so, must take the appropriate actions necessary to support the safe, reliable and economic operation of the Bulk Electric System. The Balancing Authority System Operator monitors and manages the Employer's system, while the Reliability Coordinator System Operator has a wide-area view and is responsible for monitoring both the Employer's system and those of third-party utilities.

The Balancing Authority function is very complex because load is volatile and ever-changing, requiring the Balancing Authority System Operator to consider various factors such as weather patterns and determine what impact those factors may have on load. All System Operators rely on various tools in carrying out their duties. Balancing Authority System Operators will rely on weekly unit commitment plans and the energy management system (EMS), among others. The Unit Commitment Manager<sup>22</sup> prepares the unit commitment plan, which is a seven-day forecast of the Employer's projected load and generation requirements. The plan provides guidance to System Operators regarding the available generation resources for each day.

Interchange Desk: The System Operator on the Interchange Authority console performs somewhat of an accounting function, as it is responsible for communicating with neighboring control areas to verify the interchange of megawatt flow and coordinate interchange schedules.

The Reliability Coordinator Desk: NERC has established various reliability coordinator areas throughout the United States and Canada. The Employer, along with the following utilities, are members of VACAR South reliability coordinator area: Duke Energy Progress;

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<sup>22</sup> The Unit Commitment Manager works in the Fuels and System Optimization organization, a separate business unit from the System Operators.

Santee Cooper; South Carolina Electric and Gas; and Cube Hydro. The Employer serves as the reliability coordinator agent for VACAR South and as such, it is delegated the responsibility and has the unilateral authority to carry out the Reliability Coordinator functions in the VACAR South footprint. This includes taking the appropriate and necessary Balancing Authority and TOP actions in the Employer’s service territory and within the service territories of the third-party members of VACAR South.

The Reliability Coordinator has a wide area view of the Bulk Electric System and is responsible for monitoring the conditions and planning for contingencies not only for the Employer’s electric system, but also those of the third parties in the VACAR South and beyond. Reliability Coordinators interface with many of the same employees as the Balancing Authority and TOP System Operators at the Charlotte Energy Control Center, as well as employees of VACAR South entities who are in similar positions, such as generator plant operators. The Reliability Coordinator also interacts with peer RCs from neighboring NERC territories during daily conference calls. There are approximately eight System Operators who rotate onto the Reliability Coordinator console.

## **2. Transmission Operator (TOPs)**

TOPs are primarily responsible for configuring the Employer’s transmission system equipment, including transformers, transmission lines, breakers, and switches, that is connected to the Bulk Electric System. The TOP organization of the Charlotte Energy Control Center is often referred to as the “switching side” because TOPs are responsible for coordinating with the Construction Maintenance Vegetation organization to perform scheduled and unscheduled maintenance and repair work on the transmission system equipment. Although the TOPs do not

typically perform this work on the equipment, they often communicate and issue operating instructions relating to the work in the course of performing their duties. TOPs will communicate with Construction Maintenance Vegetation employees, including technicians and craft field employees during the course of scheduled maintenance work, like switching procedures,<sup>23</sup> and repair work resulting from alarms or emergent weather conditions. TOPs are also responsible for monitoring the transmission system and ensuring its stability to support the reliable and secure operation of the Bulk Electric System. TOPs receive alarms through the EMS/SCADA system and are required to respond to those alarms. The SCADA system provides TOP System Operators with the ability to remotely access and control certain transmission equipment.

### **3. Outage Coordinators**

Outage Coordinators are referred to as the planning arm of the TOP organization of the Charlotte Energy Control Center. They work with Construction Maintenance Vegetation employees to schedule work on transmission equipment. Work management will normally request the particular type of work and the requested time of the work. The Outage Coordinators will determine whether the requested work can be done at the requested time. The Outage Coordinators may approve the work but request a different time.

Essentially, Outage Coordinators are responsible for studying the request, coordinating with the Construction Maintenance Vegetation organization to schedule the work and writing the switching orders for the work. Once the Outage Coordinators draft the switching procedures,

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<sup>23</sup> Switching involves the opening and closing of electrical circuits for maintenance or repair purposes. TOPs are required to follow NERC and Employer standards and requirements when carrying out switching orders with field employees.

they will drop it in a box in the control room. At that point, two TOPs will review and approve the switching procedure. Two TOPs will then review the draft switching orders and can make changes to it without approval from anyone. When it is being reviewed, if a TOP sees something that could present a significant problem, the TOP will reject it and send it back to McMillen's group to redo or revise. TOPs can make minor changes by hand. During the switching process, TOPS perform power flow studies of the switching procedures on the EMS and take into account contingencies that could occur. The Real-Time Contingency Analysis (RTCA) is another tool used by the System Operators, including TOPs, that allows for a review of potential risks to the system and mitigation planning to avoid those risks.

## **II. SUPERVISORY STATUS**

### **A. STATUTORY DEFINITION OF SUPERVISOR AND BURDEN OF PROOF**

Section 2(11) of the Act defines a supervisor as:

... [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To establish that individuals are supervisors, the party asserting supervisory status must show the following: (1) that the purported supervisors have the authority to engage in any one of the twelve enumerated supervisory functions; (2) that their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and (3) that their authority is exercised "in the interest of the employer." *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710-713 (2001). It is well-established that the sporadic exercise

of supervisory authority does not confer supervisory status. *Greenspan, D.D.S., P.C.*, 318 NLRB 70 (1995), *enfd. mem.* 101 F.3d 107 (2d Cir. 1996), *cert. denied* 519 U.S. 817 (1996) (isolated exercise of authority is insufficient to establish supervisory status).

The burden of proof rests with the party asserting an individual's supervisory status. *Oakwood Healthcare*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 NLRB at 713). The absence of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 *fn.* 8 (1999). Further, the Board has long recognized that purely conclusory evidence is not sufficient to establish supervisory status. *Community Educations Centers*, 360 NLRB No. 17, *slip op.* at 11 (2014); *Volair Contractors*, 341 NLRB 673, 675 (2004). Evidence in conflict or otherwise inconclusive will not be grounds for a supervisory finding. *New York University Medical Center*, 324 NLRB 887, 908 (1997), *enfd. in relevant part*, 156 F. 3d 405 (2nd Cir. 1998); *The Door*, 297 NLRB 601 *fn.*5 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). See also, *Frenchtown Acquisition Co., v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012), *enfg.* 356 NLRB No. 94 (2011).

## **B. THE EMPLOYER'S SUPERVISORY-STATUS CONTENTIONS**

The Employer that petitioned-for System Operators are Section 2(11) supervisors on two grounds:

- That they possess occasion-specific supervisory authority with respect to employees in other organizational groups, such as Construction Maintenance Vegetation employees,<sup>24</sup> generation plant employees, and support employees, who ordinarily

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<sup>24</sup> Also referred to as field employees, or field personnel.

report to their regular supervisors in the Employer’s hierarchy and organizational structure, but whom the Employer contends the Systems Operators supervise in occasion-specific circumstances, such as emergent weather, scheduled switching operations, and load fluctuation;

- The System Operators I, System Operators II, Senior System Operators, and Lead System Operators all possess supervisory authority with respect to the Associate System Operators.

I will address these contentions in the following section.

### **C. APPLICATION OF BOARD LAW**

The Board has developed extensive jurisprudence regarding the supervisory status of similar positions in the energy utility industry. In *Entergy Mississippi*, 357 NLRB 2150, 2152-2154 (2011), the Board specifically directed that the standards for determining supervisory status enunciated in *Oakwood Healthcare* – involving the supervisory status of certain nurses – applied to the utility industry. The Employer argues in its post-hearing brief that the Board should utilize a different standard than described in *Oakwood Healthcare* and *Golden Crest Healthcare*, but in this Decision I apply extant Board law.

#### **1. Authority To Assign Work**

The Employer asserts that System Operators assign work by directing generator plant operators and field personnel to perform various tasks on the Employer’s generator and transmission systems; assigning overtime; and designating field employees to work locations.

In *Oakwood Healthcare*, the Board stated that the term "assign" refers to "the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e., tasks, to an employee." 348 NLRB at 689. Accordingly, designating an employee to a particular shift or assigning certain significant tasks would qualify as assignment. Further, the authority to make an assignment, by itself, does not confer supervisory status; rather, the alleged supervisor must also use independent judgment when making such assignments. *Id.* at 692-693. Finally, the Board has stated that in order to exercise independent judgment, the direction "must be independent [free from the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" *Id.* at 693.

I find that the Employer has not met its burden to demonstrate that System Operators assign work to other employees within the meaning of Section 2(11) of the Act. As detailed below, to the extent that System Operators participate in assignment of employees to jobs, there is insufficient evidence that they exercise sufficient independent judgment to be supervisors within the meaning of the Act.

**i. Assign to a Place**

The record shows that the Employer's undisputed supervisors and managers assign field employees certain geographical working areas. First-line supervisors who are not part of the same business unit or chain of command as the Systems Operators routinely make the field assignments. If any adjustments in assignments are necessary in the field employees' regular schedules, or if an unplanned trouble call comes up, the System Operator will either call the

Construction Maintenance Vegetation field supervisors, if available, who then, in turn, contact field employees to convey any re-assignments or direct field personnel to a trouble call. In the event that the Construction Maintenance Vegetation supervisors are not available, the System Operators can dispatch field personnel through ARCOS, a call-out system that inputs information such as the Construction Maintenance Vegetation crews assigned to that particular area. Although field employees normally do not deny the System Operator's request to move from one field location to another, they do not have to comply in certain instances, for example, where the field employee has a family emergency or where the action would pose a safety risk to the stability of the unit.

In its post-hearing brief, the Employer asserts that because TOP System Operators have sent Construction Maintenance Vegetation crews to support emergent issues or in some situations, ongoing maintenance work, the System Operators have designated employees to a place such as a location, department or wing. *Oakwood Healthcare, Inc.*, 348 NLRB at 689. At the hearing, there was witness testimony concerning the communications between the System Operators and Construction Maintenance Vegetation organization in coordinating field work in both emergency and normal conditions. When asked to describe the ARCOS system that System Operators use to communicate to field employees, Lyerly stated:

ARCOS is a tool where the field puts in the people who would be responding to call-outs. And when we need to have somebody respond to an alarm, we typically will use the ARCOS tool, which automatically dials people for somebody to accept the call, even though they don't know what the problem is. Or we go in there and we look at -- I think they call them daily routes. Like, what they're going to be doing that day, and determine who is the best person to call based upon the route that they're doing that day and the station that is alarming, and, you know, who's going to be closest geographically. So we use it for information, and we use the automated process sometimes of calling out personnel to respond to us so that we can give them direction on where to go.

Lyerly further testified that ARCOS is just one method or tool that System Operators can use to call-out field personnel to specific locations to respond to alarms, but that System Operators “have been known to call other disciplines like relay techs...directly when we know...exactly what's going on.” In those occasions, the System Operators have “bypassed calling a service tech and reached out to other field technicians in other disciplines as needed” and System Operators have also “called area supervisors before.”

In making the decision of what discipline to call in the field to respond to a trouble location, Lyerly testified that System Operators will consider “the type of the alarm, the location of the alarm, what is actually occurring.” Based on the cumulative record testimony, System Operators do not select the specific field employees to assign to a particular location, but rather, rely on either field supervisors or an automated call-out system driven by the geographic locations to which available field personnel have been assigned by their own supervisors.

Lyerly also testified about a recorded conversation that was played during the hearing. When asked about the recording, Lyerly testified that “it sounds like, I think, it’s James Brandon Ross. He probably initiated a call to a service tech...And redirected him to respond to a enunciator relay alarm on a bank.” (Tr. 220) Lyerly further testified that the recording reflected a typical example of a high priority EMS alarm and an operator, in this case, Senior System Operator Ross, making the decision to send a service technician who was assigned in the field to go to the alarm location to look into it, which the technician agreed to do based on the high priority alarm and the service technician’s own assessment of the alarm as “a bad situation.”

Lyerly further provided general testimony regarding a recent hurricane event when, at 3:00 p.m., “we had about 35 to 40 operations, including outages, that occurred within about a two-hour span” which required the System Operators to respond to alarms, test lines,

communicate outages while also monitoring Real Time Contingency Analysis (RTCA). Lysterly did not testify with any particularity about how the operators responded to the alarms, whether or how it dispatched Construction Maintenance Vegetation employees to outage locations or any other details about the exact steps taken to provide support to the trouble locations. See *Chevron Shipping Co.*, 317 NLRB at 381 fn. 6 (conclusory statements without supporting evidence do not establish supervisory authority).

Even assuming that the evidence does establish that System Operators assign field employees to specific locations to perform work, there is insufficient record evidence to establish that System Operators make such location assignments based independent judgment. Rather, the System Operators designate field employees to specific locations based primarily on the normal geographic assignment areas to which field personnel are assigned to work. The System Operators do not make those geographical area assignments; rather, it is the field supervisor or work management group who determines that.

Further, deciding that a particular discipline of field personnel is needed to respond to specific emergent trouble locations is a routine assessment based on System Operators' training and experience. Director Minh also testified that System Operators performing generation dispatch cannot call a power plant operator and tell that plant operator to assign a specific employee to perform the generation increase or decrease that the System Operator requests. The control room operator of the power plant will then take the next steps to execute the action.

In sum, the record shows that System Operators do not directly inform field employees as to where they are to go, but, rather, they request field employees through their supervisors or ARCOS. The evidence does not establish that these requests are "assignments" that are made

with any supervisory discretion as required by *Oakwood*. *Entergy Mississippi*, 357 NLRB at 2156.

ii. **Assign to a Time**

The Employer argues that System Operators regularly dispatch and reassign Construction Maintenance Vegetation employees to assignments that frequently require overtime and that those field employees are expected to work those assignments unless there is an emergency situation with the field employee(s). Lyster testified that such emergency situations “would be a rare instance” without further details on specific instances in which it has happened. No matter how often such circumstances arise, the record evidence shows that System Operators do not have the authority to require field employees to work overtime or respond to a particular trouble location.

There is conflicting witness testimony whereby TOP System Operator II Scott Autenrieth described ARCOS as a computer system that contacts the field service technician responsible for the area where there is a high priority alarm. He testified:

If operator or service tech A rejects it for some reason, it rolls to the next person. Operator B picks it up. Operator B would -- or service tech B would call me and say, Scott, you ARCOS'd me. And I'd say, yeah, I have an alarm at such-and-such station. Are you free? The gentleman or gal in the field may comply and say, yeah, I can get there for you, or they may say, I can't leave where I am. My hands are tied. You need to call my supervisor, and then the supervisor would then tell me who I should contact to go address that situation.

Autenrieth stated that 50% of the times where he has had to contact a service technician in the field to respond to an alarm, the field technician will turn down the assignment because he or she is unable to do it. Therefore, it appears that it is not uncommon for field employees to turn down

assignments in particular trouble locations contrary to Lyerly’s testimony that it was a “rare occasion.”<sup>25</sup>

The Employer further argues that System Operators can assign other unscheduled System Operators to additional shifts in order to increase staffing at times when there are significant risks to the system, including emergent weather, or to fill in for an unscheduled absence. The Employer maintains that these assignments have the potential of resulting in overtime and are made with independent judgment without the approval of higher management. Charlotte Energy Control Center Director Minh testified that for each shift in the control room, there are relief personnel assigned to each shift. Minh explained that in deciding who to call in for additional shifts, the relief personnel would be the first individuals called; however, the Energy Control Center is currently understaffed and as a result, the relief personnel are often already scheduled beyond their allotted time. In that situation, the determination of who to call in is just based on who is available. System Operators would then go outside of the scheduled relief personnel list and call System Operators based on their availability to work additional shifts and this would likely result in overtime.

The evidence does not establish that System Operators can require field employees or other System Operators to work overtime. Further, there is insufficient record evidence to support the Employer’s conclusory argument that the decision to assign overtime to field employees or other System Operators is made with independent judgment, as it is often a routine decision determined by a need for adequate coverage either to fill in for an unscheduled absence or to ensure proper staffing in response to emergent weather conditions. See *Golden Crest*

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<sup>25</sup> Throughout his testimony, Lyerly responded to questions stating that he did not know certain specifics because he was not close enough to the work. Minh also testified to this as well.

*Healthcare*, 348 NLRB 727, 731 ("purely conclusory evidence is not sufficient to establish supervisory status; instead, the Board requires evidence that the employee actually possesses the Section 2(11) authority at issue"); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without supplying evidence do not establish supervisory authority). Thus, the evidence does to establish that assignment of overtime requires the System Operators to use independent judgment.

The record evidence also reveals that System Operators cannot mandate that employees work overtime. The Board has held that to establish that the authority to assign overtime is supervisory; the evidence must also show that the alleged supervisors have authority to require employees to work the overtime assigned to them. *Entergy Mississippi, Inc.*, 357 NLRB at 2156 (2011) citing *Golden Crest Healthcare*, 348 NLRB at 729 (the party claiming an individual is a supervisor "must show that the alleged supervisor has the ability to require that a certain action be taken; supervisory authority is not established where the alleged supervisor has the authority merely to request that a certain action be taken").

Based on the record, I find that the System Operators' assignment of overtime is routine, clerical, and perfunctory in nature and is insufficient to establish supervisory status. The evidence establishes that the System Operators request field employees either through field employees' supervisors or via ARCOS. Such assignments are not permanent in nature and are either completely structured based on the Employer's designation of the field employee or established via ARCOS call-out lists. Similarly, System Operators assigning other System Operators to additional shifts is routine in nature and they cannot mandate that any System Operators, including the priority relief personnel to work additional shifts. The assignment of

additional System Operators to a particular shift, even assuming it would result in overtime, is more a function of how the employees are designated on the schedule.

**iii. Assigning Significant Overall Duties**

The Employer maintains that the petitioned-for System Operators who report to Manager McMillen, commonly referred to as Outage Coordinators, are statutory supervisors because they draft switching procedures and in doing so, assign field employees to significant overall duties. In its post-hearing brief, the Employer represents: “In *Entergy Mississippi, Inc.* the majority held that Outage Coordinators who drafted the switching procedures were supervisors because they assigned field employees to significant overall duties.” (citing *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2157 (2011)). The Board’s decision in that case does not entirely match up with the Employer’s summary of the holding. Thus, the issue before the Board in *Entergy* was whether *dispatchers* were supervisors, and the Board found that the record did not establish that they were. 357 NLRB at 2157. In reaching this conclusion, the Board noted that *operations coordinators* (not “outage coordinators”) assigned significant overall tasks to field employees. Here, the duties of the outage-coordinating System Operators are more in line with the duties of the dispatchers the Board found not to be supervisors in *Entergy*. By contrast, the operations coordinators which the Board indicated made overall assignments in *Entergy*, are akin to the Employer’s Construction Maintenance Vegetation work management personnel,<sup>26</sup> who are responsible for the overall daily assignment of tasks to field employees.

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<sup>26</sup> The Petitioner has not sought to include these individuals in the unit, so I do not pass on their supervisory status.

Senior System Operator Shane Erwin testified as to the range of time tasks assigned to Construction Maintenance Vegetation field employees at System Operators' instance may take, ranging from 15 minutes to a few hours for switching procedures as well as functional trip testing that can take all day to complete. With these latter assignments, made through the field supervisors or the ARCOS system, the System Operator stays in touch with the field employees while the work is ongoing.

Manager Lyerly testified that during Hurricane Michael, TOPs assigned/reassigned Construction Maintenance Vegetation teams to 35-40 unscheduled events in about a two-hour period. That testimony does not make clear how many field employees were reassigned from their normal assignment in connection with this one-time exigency. In any event, this isolated occurrence does not appear to constitute the type of assignment of significant overall duties that the Board envisioned in *Oakwood* to be supervisory.

The Employer failed to present particularized record evidence describing actual incidents in which the System Operators make assignments to field employees or dispatch Construction Maintenance Vegetation teams to duties on a regular basis. Even finding that they did make sufficient overall assignments of work to other employees, for instance, in the case of emergent weather conditions or in response to high priority alarms, the System Operators are not using independent judgment in making those assignments. Accordingly, I find that the System Operators are not statutory supervisors because they assign work to other employees, as the Employer contends.

## **2. Authority to Responsibly Direct Work**

The Employer argues that System Operators are statutory supervisors because they have the authority to responsibly direct the work of other employees. I find that the Employer failed to meet its burden in this regard.

For direction to be responsible, the person directing must have oversight of another's work and be held accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, and is at risk of adverse consequences for others' deficiencies. *Oakwood Healthcare*, 348 NLRB at 691-692. As with all of the supervisory indicia enumerated in Section 2(11), responsible direction must include independent judgment. Thus, the responsible direction must be (a) independent, free of the control of others; (b) involve a judgment, that is, require forming an opinion or evaluation by discerning and comparing data, and (c) involve a degree of discretion that rises above the routine or clerical. *Id.* at 692-693; *Golden Crest Healthcare*, 348 NLRB at 730.

The first question is whether the Employer has established that System Operators direct other employees within the meaning of Section 2(11). The Employer asserts that System Operators responsibly direct field employees by: 1) directing power plant operators to increase or decrease power generation or to bring generation resources online or take them offline; 2) directing other System Operators and field employees to stop or begin scheduled work; and 3) directing the Unit Commitment Manager or Power Trader to purchase or sell power on the open market on the Employer's behalf.

The record evidence reflects that as part of their duties, the System Operators are responsible for taking appropriate and necessary actions to ensure the reliable and secure

operation of the Bulk Electric System, which would include any of the things mentioned in the Employer’s arguments above. At hearing, the parties and witnesses disputed certain characterizations of terms like “direct,” “require,” and “request.” Putting semantics aside, the record reflects that many of these interactions that System Operators have with other employees such as the performance of switching procedures involving field employees and System Operators amount to little more than exchange of information or guidance. One witness went so far as to characterize such interactions with field employees and power plant operators as nothing more than “conversations.” The evidence is insufficient to establish that the System Operators “direct” the field employees within the meaning of the definition set forth in *Oakwood. Golden Crest Healthcare Center*, 348 NLRB at 731.

The next issue is whether the Employer has established that the System Operators are accountable for their actions in directing the field employees. I find that the Employer has not met its burden. The record lacks evidence that the Employer has disciplined System Operators for failure to oversee or correct a field employee, or as a result of a field employee’s failure to adequately perform her/his duties. While higher-level personnel testified that System Operators can be and have been held accountable for field employee deficiencies, this testimony is conclusory, unsupported by concrete evidence or examples, and thus lacking in evidentiary value.

The Employer represented that it does not have a progressive disciplinary policy nor a culture based on discipline. Instead, as the Employer contends and as is illustrated by witness testimony, the Employer fosters a culture of coaching. Thus, it is not clear from the record that a “coaching” would even amount to a risk of adverse consequence. In this regard, Lyerly testified

that he gave a coaching to a System Operator for errors in a switching order that he gave to a relay technician in the field. Based on the switching procedures, which were properly communicated to the relay tech, the tech opened a breaker and that action resulted in a drop of approximately 34 megawatts of load and, consequently, caused an outage. This example, among others offered, does not demonstrate that the System Operators were coached in relation to anything but their own performance or conduct, rather than the deficient performance of field employees. This merely shows that the System Operators are accountable for their own performance or lack thereof, not that of field employees. It does not establish responsible direction. *Entergy Mississippi*, 357 NLRB at 2156, citing *Oakwood* at 695. The record is devoid of evidence demonstrating that the Employer holds System Operators accountable within the meaning announced in *Oakwood*.

The Employer further argues that accountability is demonstrated through the negative impact the conduct of a power plant operator's conduct would have, for example, if the plant operator exercised poor judgment in telling the System Operator that he or she could not comply with the System Operator's request. In that example, the System Operator would figure out another solution to the issue, which could be less efficient and economical. In the event that the second option was less efficient than the first option, going with the second option would still have an overall impact on a System Operator's efficiency metrics goals. However, the record is absent of any documentary evidence or substantive witness testimony that supports this argument. Contrary to the Employer's characterization of the record evidence, I do not find that the Employer holds System Operators accountable for the field employees' work.

The Employer offered the 2015 performance appraisal of Reliability Coordinator Lead System Operator Gregory Lowrance<sup>27</sup> and elicited testimony to suggest that Lowrance had scored higher on his appraisal, or at minimum, received higher remarks, based on his “coaching” and “training” of two other crew team members who were relatively young and inexperienced, all while achieving certain operational metrics goals. While the performance appraisal contained positive feedback to Lowrance for certain actions he undertook on behalf of less experienced crew team members and other System Operators, including voluntarily providing extra shift coverage, staying longer during shift turnover to show the oncoming Reliability Coordinator things he had found in the EMS, and manning the back-up center with another employee, it reveals no evidence that the Employer even mentions any of the Lowrance’s deficiencies with respect to the job performance or that of other Charlotte Energy Control Center System Operators; employees of third-party entities in neighboring control areas; or other field employees, much less the prospect of adverse consequences.

The performance evaluation contained a broad range of goals and core competency assessments, including “Training,” “Collaborates,” and “Recommends Solutions.” However, these goals and competencies simply appear to be addressing the ability of Lowrance to be an example, to foster a positive working environment, to provide feedback to employees and develop their skills and other similar general assessments. The evaluations do not provide any clear evidence on whether System Operators are accountable for the actions of other employees.

Director Callaway testified that although System Operators could not discipline anyone, including a generator operator who does not comply with the System Operator’s request to take

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<sup>27</sup> Employer Exhibit 10.

certain action on a generating resource; she did, however, state that System Operators are responsible for “coaching” their operator crew team to “make sure the team is cohesive.” System Operators testified that they are not held accountable for the work of other employees and the record reflects no documentary evidence to establish otherwise.

In each of the specific incidents that the Employer relied on in its post-hearing brief, the System Operators in question were merely “coached” for their own conduct in directing the work of other employees rather than the performance of the employees to whom the System Operators were giving direction. Accordingly, I find that the System Operators do not possess the authority to responsibly direct the work of other employees within the meaning of Section 2(11) of the Act. See *Croft Metals, Inc.*, 348 NLRB 717 (2006).

### **3. Supervision of Associate System Operators**

A utility regulation, NERC Standard PER-003-1, requires that a job-task trained and NERC-certified System Operator (in the case of the Employer, any System Operator above the rank of Associate System Operator) be present when an Associate System Operator is performing reliability-related tasks on the Bulk Electric System in real time. This regulation relays that non-NERC certified personnel performing a reliability-related task on the Bulk Electric System in real time must do so under the “direct supervision” of NERC-certified personnel, who in turn have ultimate responsibility for performance of the reliability-related task. The term “supervisor,” as set forth in Section 2(11) of the Act has special legal significance the Board has developed over decades of jurisprudence. The NERC Standard use of the term “direct supervision,” does not provide the level of definitional specificity that Section 2(11) of the Act does, and is not controlling on the question of whether the System Operators are supervisors

within the meaning of the Act. While a job-task trained and NERC-certified System Operator will ultimately have responsibility when an Associate System Operator performs reliability-related tasks on the Bulk Electric System in real time, the record did not establish that having this responsibility included possessing or exercising Section 2(11) authorities, as opposed to being responsible to monitor the Associate System Operators' tasks and step in if something goes awry to ensure proper continued operations.

#### **4. Secondary Indicia**

The Board has identified certain secondary indicia, which may be persuasive in considering whether an individual is a supervisor within the meaning of Section 2(11) of the Act. These include supervisor-to-employee ratio, higher pay and benefits, attending managerial meetings. Where putative supervisors are not shown to possess any of the primary supervisory authorities listed in Section 2(11) of the Act, secondary indicia alone are insufficient to establish supervisory status. *Golden Crest Healthcare*, 348 NLRB 727, 730 n. 10 (2006); *Ken-Crest Services*, 335 NLRB 777, 779 (2001). Although the Employer offered several documents, including job descriptions, the Employer's Responsibility and Authority Letter for System Operations and a performance appraisal, whose broad language may appear to grant supervisory authority to System Operators, the Board has long held that evidence of actual authority trumps paper authority. *Valley Slurry Seal Co.*, 343 NLRB 233, 235 (2004), *Franklin Home Health Agency*, 337 NLRB 826, 829 (2002); *Training School at Vineland*, 332 NLRB 1412, 1416 (2000) ("Job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. The Board insists on evidence supporting a finding of actual as

opposed to mere paper authority"). In the absence of any primary indicia, I reject the Employer's argument.

In sum, for the reasons cited above, I find that the petitioned-for System Operators are skilled employees capable of working independently under the guidelines and various control systems established by the Employer and comprehensive regulations and mandatory standards. I find that they do not exercise independent judgment in assigning or responsibly directing other employees, and, are therefore, not statutory supervisors.

### **III. MANAGERIAL STATUS**

#### **1. BOARD LAW REGARDING MANAGERIAL STATUS**

Although the Act makes no specific reference to "managerial employees," the Board excludes this category of personnel from the protections of the Act and collective-bargaining rights. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974). Managerial employees are those who, by expressing and making operative the decisions of their employer, formulate and effectuate the policies of management. In *NLRB v. Yeshiva University*, 444 U.S. 672, 683 (1980), the Supreme Court held that "an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." The Court went on to explain that "employees whose decision making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage," and that, further, "[o]nly if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." *Id.* at 690. The determination of an employee's managerial status depends on the extent of the employee's

discretion, such that, an employee who exercises limited discretion, bordering on routine performance, will not be deemed managerial.

## **2. APPLICATION OF BOARD LAW**

The Employer argues that the petitioned-for System Operators are managerial employees who are not subject to collective bargaining, contending that they: represent the Employer through leadership roles on committees of regulatory bodies; develop, modify and effectuate Employer policy; attend management meetings; can commit the Employer to purchase additional power generation when needed and take other actions that have economic impact on the Employer; and have similar compensation and benefits to other higher-level personnel. I disagree with the Employer's contentions and find insufficient record evidence to establish that the petitioned-for System Operators are managerial employees excluded from the Act's coverage.

### **1. Participation in Regulatory Committees**

The Employer contends that System Operators' participation on committees of regulatory agencies along with higher level personnel of utilities and that their leadership role on these committees establishes the managerial status of the petitioned-for System Operators. Vice President of Transmission Systems Planning and Operations Holeman testified that previously served on both NERC and SERC Operating Committees and also chaired both committees. He chaired the NERC Operating Committee when the concept of NERC-certification was initiated and in 1998, he was part of the first class of NERC-certified system operator class. The record indicated that the SERC Sub-Committee reports to SERC's Operating Committee, who then reports to SERC's Board of Directors.

Although the Employer contends that System Operators have represented the Employer as members on the SERC Operators Sub-Committee, the record does not detail which specific individuals within the petitioned-for unit served on committees, when, or for how long. Even assuming that some of the disputed employees served on some or even all of these committees, there is no evidence in the record suggesting that the disputed employees are in any way involved, for instance, in regulatory compliance issues or that they commit to any recommendations of these committees or sub-committees on behalf of the Employer. The evidence establishes nothing more than the petitioned-for System Operators may have served as a conduit in the collaborative and interactive process essential to any highly-regulated industry, such as energy utilities. Further, assuming that these task forces made recommendations on compliance or other regulatory issues, the record indicates that there were various levels of review and approval. I do not find, as the Employer contends, that the System Operators' contact with these regulatory authorities reflects any degree of a "regulatory leadership" role warranting a finding of managerial status.

## **2. Development of Policy**

The Employer contends that the employees in the petitioned-for unit are managerial based on record evidence that they assist in the review and revisions of some of the Employer's standard practices and operating manuals. Manager Lyerly testified about an "operator's committee" comprised of System Operators and supervisors from different regions. He further testified that the operator's committee "was formed as an opportunity to...use best practices and work on particular initiatives." When asked about whether the committee had ever produced any policies, Lyerly affirmed that it had and went on to explain that the committee identified gaps

and opportunities and “try to come together to define one policy, taking all of the best practices from each group...to come up with, you know, one product.” The Employer presented an EMS checklist document which comprises the various things that System Operators should check after an issue occurs with the EMS to ensure that everything in the system is operating correctly. Lyerly testified that the document is a byproduct of the operator’s committee and is utilized by System Operators in the Charlotte Energy Control Center. Some System Operators’ participation in committees, along with supervisors in reviewing and publishing a checklist document regarding system operation demonstrates that the Employer has drawn on System Operators’ subject-matter expertise in codifying effective practices, but this does not transform them to managers.

The Employer presented a Work Practice Manual that Associate System Operators use as a learning tool to better understand some of the work practices of a System Operator. The Work Practice Manual is an internal Charlotte Energy Control Center document that incorporates some of the decisions and best practices resulting from the lead meetings. It also highlights some of the points from the Switching and Tagging Manual and other office policies resulting from the lead meetings. Lyerly testified that he did not know the origin of the Work Practice Manual, but that a Lead System Operator currently maintains the manual.

The cumulative record evidence establishes that these documents must comply and be consistent with established policy, as devised or administered by regulatory agencies and the Employer. The Employer did not present evidence that any of the System Operators possess the authority to set policies based on their own independent discretion. As the System Operators routinely perform and carry out extensive and largely predetermined set of policies and

regulations, the evidence is insufficient to warrant a finding that the System Operators are managerial employees. See *Eastern Camera & Photo Corp.*, 140 NLRB 569, 571 (1963).

### **3. Attending Management Meetings**

Manager Lyerly testified about “lead meetings” in which managers bring in members of the crew teams, including System Operator IIs, Senior System Operators and Lead System Operators and “talk about situations in the control room that need to be resolved, especially like inconsistencies in work practices.” The meetings usually occur on a monthly basis and other topics are discussed, including corrective actions, switching errors and how to improve as a group in terms of “human performance tools.” The crew team representatives then carry the decisions from these lead meetings back into the control room and are responsible for disseminating the information to their respective crews and push them forward. That System Operators attend collaborative meetings in which managers or supervisors are present does not convert them into managers.

### **4. Pledging of Credit and Other Economic Decisions**

The Employer further argues that System Operators possess the independent authority and discretion to purchase additional generator power from non-Duke entities when needed and that this supports a finding that System Operators are managerial employees. The record reveals that the System Operators’ infrequent and sporadic decisions which could potentially result in economic impact to the Employer, such as such as causing employees to accrue overtime and requesting additional power generation from outside utilities, do not establish managerial status as they do not meet the level of policy formulation and effectuation required for such a finding.

The Board denied the Employer’s request to review and affirmed the regional director’s determination in *Connecticut Light and Power Company*, Case 01–RC–112451 (December 5, 2013) that the disputed employees were not managerial although they had authority to commit up to \$10,000 of the company’s funds, without higher approval, to take corrective action on electrical circuits. In denying the request for review, the Board noted that “[t]heir spending discretion is exercised within the confines of the Employer’s policy to ensure the reliable provision of electrical power to its customers and does not involve ‘formulat[ing] and effectuat[ing] management policies by expressing and making operative decisions of the employer.’” Citing *Bell Aerospace*, 416 U.S. 286 (1974); *International Transportation Service*, 344 NLRB 279, 286 (2005), enf. denied on other grounds, 449 F.3d 160, 163 (D.C. Cir. 2006); *The Washington Post Co.*, 254 NLRB 168, 189 (1981). Similarly, here, the System Operators’ occasional and sporadic decisions which potentially caused field employees and other System Operators to accrue overtime or requesting, through the marketer or unit commitment manager, excess generation from outside utilities does not rise to the level of “formulating and effectuating management policies by expressing and making operative decisions” on the Employer’s behalf.

## **5. Compensation**

The Employer introduced evidence that it compensates the petitioned-for System Operators on a salaried basis, as it does managers, and that unionized dispatchers at one of the Employer’s affiliated companies are hourly employees. The record does not detail all of the aspects of the System Operators’ compensation. While compensation is a consideration, the Board does not find it dispositive and as the record is not extensive about the other facets of the System Operators’ compensation, I do not find that their salaried-compensation basis confers

managerial status. I note that the System Operators are highly-skilled employees with extensive and important responsibilities integral to the Employer's power-generation operation, which may justify different compensation than other non-managerial employees, without conferring managerial status.

For the reasons stated above, I do not find that the petitioned-for System Operators are managerial employees excluded from collective-bargaining rights.<sup>28</sup>

#### **IV. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

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<sup>28</sup> The record established that a unit of represented employees at the Duke Energy Florida, LLC's Energy Control Center who are classified as dispatchers, not System Operators. At the hearing, the Employer objected to witness testimony and documents related to the Energy Control Center unit of dispatcher employees, which the hearing officer overruled. The record established that the System Operator job descriptions (E-7) also apply to the dispatcher employees at the Florida Energy Control Center; however, the record reflected many differences regarding the terms and conditions of employment of the Charlotte Energy Control Center System Operators and the Florida Energy Control Center dispatcher employees. Further, although the Energy Control Center dispatcher employees possess many of the same skills as the petitioned-for System Operators, they work on entirely different systems and are subject to a different supervisory reporting structure. Senior Vice President and Chief Transmission Officer Nelson Peeler testified that representation of the Florida Energy Control Center dispatchers dates back to at least the 1950s, long before the comprehensive regulation of the electric industry that exists in the industry today. I do not find the evidence on the Energy Control Center unit controlling to the supervisory or managerial status of the petitioned-for unit presented in this case.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time Associate System Operators, System Operators I, System Operators II, Senior System Operators, and Lead System Operators employed by Duke Energy Carolinas, LLC at its Energy Control Center in the 9550 Research Drive facility in Charlotte, North Carolina, excluding all other employees, guards and supervisory personnel as defined in the National Labor Relations Act.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Electrical Workers, Local 962, AFL-CIO.

#### **A. Election Details**

During the hearing, both parties were given an opportunity to argue their respective positions as to which election method should be used and were also advised they could do so in their post-hearing briefs. The Employer argued strenuously that the Region should direct a manual election because the Board favors manual elections where feasible. The Employer's position statement included the following proposed schedule of election: Energy Control Center

Simulator Room on Wednesday, November 28 and Thursday, November 29, 2018 from 4:45 a.m. to 6:45 a.m. and 4:00 p.m. to 6:00 p.m. The last payroll ending date offered by Employer in its position statement was October 31, 2018.

Petitioner, on the other hand, argued that a mail ballot election is appropriate here due to the divergent work schedules of employees in the petitioned-for unit. The Petitioner contends that it is common for crew teams to work three consecutive days on either the day shift or night shift and then have five days off from work. The Petitioner further asserts that approximately six of the petitioned-for employees live about two hours away from the Employer's facility. Therefore, given the scheduling variances and distances that employees would have to drive, perhaps on days that they are not scheduled to work, a manual ballot would not ensure strong voter turnout and would not allow the majority of unit employees to vote before, during or after their normally scheduled work day.

Having reviewed the parties' positions and submissions on the record, on balance I conclude that holding a **manual ballot** election would be the best method of conducting the election. While the record reflects limited information regarding the specific work schedules of unit employees, there is no dispute that all employees in the proposed unit work out of the Employer's Charlotte, North Carolina Energy Control Center on rotating shifts, which supports the conclusion that a manual ballot election is feasible.

In light of the above, the election will be conducted by manual ballot and will be held on **Tuesday, February 12** and **Thursday, February 14, 2019**, from 4:00 a.m. to 7:00 a.m. and 4:00 p.m. to 7:00 p.m. in the Energy Control Center Simulator Room at the Employer's facility located at 9550 Research Drive in Charlotte, NC.

**B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending **January 23, 2019**<sup>29</sup>, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

**C. Voter List**

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

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<sup>29</sup> This date is based on the information provided in the Employer's Statement of Position.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Friday, February 1, 2019**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with these requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

**D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: January 30, 2019



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